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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,134

STATES MARINE LINES, INC., GLOBAL BULK TRANSPORT CORPORATION, *Petitioners,*

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, *Respondents,*

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *Intervenors.*

Petition to Review an Order of the Federal Maritime Commission

BRIEF FOR INTERVENORS

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Dated: September 19, 1966.

STATEMENT OF QUESTIONS PRESENTED

1. Whether petitioners, members of the intervening conferences of carriers, have standing under the Review Act of 1950 to seek review of an order of the Federal Maritime Commission approving intervenors' system of industrial self-policing.
2. Whether the Federal Maritime Commission properly considered and approved intervenors' self-policing proposals (identified as Agreements 150-29 and 3103-26) over petitioners' objection they were not noticed for hearing or placed in evidence.
3. Whether Section 15 of the Shipping Act, 1916, as amended, requires the adoption of modifications to conference agreements on the unanimous votes of their members; if not, whether on the present record intervenors' majority voting rules should continue to be approved.
4. Whether the Federal Maritime Commission properly approved pursuant to Section 15 of the Shipping Act, 1916, as amended, intervenors' conference agreement modifications (identified as Agreements 150-21 as modified by 150-29 and 3103-17 as modified by 3103-26) which establish the machinery for conference self-policing and provide for the selection of a neutral body appointee which:
   A. May have a disclosed and approved "professional or business relationship" with one or more member lines, except one charged with an agreement violation;
   B. Is required to advise the accused of the nature of the alleged breach, bearing in mind basic precepts of fair play, before making its determination;
   C. Is not permitted to reveal the identity of the complaining member line without his consent;
   D. May make surprise investigations of the accused

line's premises with the right to demand prompt access to all books and records which it deems relevant to the complaint under investigation;

E. Is required to advise the accused line the nature of the alleged breach and disclose all actual evidence it can without revealing the identity of the complainant or jeopardizing confidentiality; to meet with the accused (and his counsel) and hear any explanation or rebuttal evidence offered, and consider all the available evidence before making a determination;

F. May, if a breach is found after hearing, impose liquidated damages according to a fixed scale but is to consider such mitigating circumstances as it shall deem relevant;

G. Make final decisions which are nonreviewable on the merits but which may be reviewed by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, or by the courts.

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BRIEF FOR INTERVENORS

COUNTERSTATEMENT OF THE CASE

Intervenors, Trans-Pacific Freight Conference of Japan (TPF)[1] and Japan-Atlantic and Gulf Freight Conference (JAG),[2] are associations of international shipping lines flying the flags of more than ten nations.

Common carriers are free to enter the conferences and resign without penalty. The conferences have desired to effectuate a suitable form of so-called "dual rate contract"

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[1] Operating under FMC Agreement 150.
[2] Operating under FMC Agreement 3103.

for some time, but the matter is still pending final Commission action.[3] Should such a contract be effectuated, its effect upon the operations of non-conference lines is problematical. Non-conference lines are highly successful in innumerable trades where dual rate contracts are in effect.

In 1958 and 1959, respectively, the members of TPF and JAG each agreed upon a system, called a "neutral body," to investigate complaints of unfair, monopolistic trade practices prohibited by the conference agreements ("malpractices"), and assess liquidated damages against member lines found to be perpetrating them.

The original Article 25 of the conference agreements, the article governing neutral body operations, provided that neutral bodies could be neither "financially interested in" nor "employed by" any member line. TPF formed a committee to appoint a neutral body and that committee selected the international accounting firm of Lowe, Bingham and Thomsons (Lowe), knowing it was a correspondent of the accounting firm of Price, Waterhouse & Co. (Price), the regular auditors of a conference member.[4]

Lowe, pursuant to its duty to investigate and decide complaints of member lines' malpractices, visited the Tokyo Office of States Marine Line, Inc., a member of TPF and JAG, in January 1959, and requested records on the movement of mandarin oranges in the 1959 Japan-Canada trade. It had received a complaint of States Marine rebating freight charges for those carryings. States Marine gave access to its Tokyo records, but Lowe discovered only requests for free passage by mandarin orange shippers (Ex. 17; JA 241, 242).

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[3] See Japan-Atlantic and Gulf Freight Conference and Trans-Pacific Freight Conference of Japan Modification of Dual Rate Contract, FMC Docket 65-52, Initial Decision served September 1, 1966.

[4] These facts and the other facts set out below regarding Lowe's and Price's investigations are contained in States Marine Lines, Inc. v. Trans-Pacific Freight Conference of Japan, 7 F.M.C. 204 (1962), unless individually documented herein.

In order to determine whether the requests had been granted, Lowe's New York correspondent, Price, requested access to records in States Marine's head office in New York. It is the chain of events following this request which States Marine points to as a past example of unfairness by a neutral body.

On April 28, 1959, States Marine's Executive Vice President agreed to Lowe's inspection, but the next day States Marine reneged, giving inconvenience and confidentiality of its records, *not neutral body professional relationships*, as its reasons for doing so, and suggesting that its own regular auditors, Peat, Marwick, Mitchell & Co. (Peat), carry out the investigation and certify the results (Ex. 32; JA 275, 276). On May 29, and again on July 7, 1959, the same proposal was made, with the same reasons given (Exs. 35, 36; JA 277, 278).

Finally, on July 27, 1959, the question of "neutrality" was born, when States Marine came up with its objection to Lowe and Price carrying out neutral body functions because they had professional relationships as auditors to at least one member of the conference. States Marine filed a complaint with the Federal Maritime Commission's predecessor [5] which was grounded upon this "neutrality" issue.

In August 1959, Lowe made a $10,000 assessment against States Marine under the neutral body provisions for its refusal to grant Price access to its records. While States Marine's complaint in Docket 920 was pending, Lowe received a complaint alleging States Marine rebating in the mandarin orange trade during the year 1960, and Lowe once more visited States Marine's offices, only to be refused access again. Pursuant to still another complaint, Lowe requested, and was denied, access to the records of Isthmian Lines for the carriage of mandarin oranges in the 1959 season. Assessments were made for both of these refusals.

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[5] The Complaint was assigned Federal Maritime Board Docket No. 920.

The allegations of States Marine's complaint in Docket 920 included unfairness in the neutral body's procedures. The Commission explicitly rejected these allegations, saying: "This case . . . in no way concerns the conduct or ethics of the accounting firms involved. Lowe does not qualify as the Neutral Body simply because it does not meet the specifications set forth by the conference itself and approved by the Board."[6] The Commission decided in States Marine's favor on the narrow ground that the words "employed by" applied to the relationship between a certified public accountant and his client, thus the Conference had been carrying out an agreement modification which should have been submitted for approval under Section 15 of the Shipping Act, 1916.[7] It pointed out TPF could modify its agreement to permit the use of accounting firms which audited the books of member lines.

Both conferences followed the Commission's suggestion and modified their agreements, setting forth the modifications in Agreements 150-21 and 3103-17. These agreements[8] were approved by order dated October 30, 1963, which order was appealed to this Court, but remanded for further consideration at the request of the Maritime Commission.

The order reopening the proceeding on remand, served April 2, 1964, placed in issue the approvability, under Section 15 of the Shipping Act, 1916, of Agreements 150-21 and 3103-17. A subsequent order[9] included the issue whether Articles 10, 12, and 25 in Agreements 150 and 3103, as they then stood approved, should be disapproved.

The order was further amended, at States Marine's request, to include the question whether the unanimous vote

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[6] States Marine Lines, Inc. v. Trans-Pacific Freight Conference of Japan, 7 F.M.C. 204, 215 (1962).

[7] 39 Stat. 733, 46 U.S.C. §814, as amended.

[8] JA 442-448.

[9] Served May 15, 1964.

of the parties was required for modifications to agreements approved under Section 15 although the agreements provide, as do Agreements 150 and 3103, that modifications may be accomplished by less than unanimity.[10]

As witnesses at the hearing, intervenors presented Mr. James F. McCone, Traffic Manager of Pacific Far East Line, Inc., testifying on behalf of TPF; Mr. Alex C. Cocke, Vice President of Lykes Bros. Steamship Co., Inc., testifying on behalf of JAG; Mr. John D. Waldroup, Resident Partner, Tokyo office, Arthur Young & Co.; and Mr. Ralph S. Johns, Senior Partner, Chicago Office, Haskins & Sells, and Chairman of the Ethics Committee of the American Institute of Certified Public Accountants.

During the hearing, counsel for the conferences offered in evidence modifications to Articles 10 and 25 of the Agreements.[11] These amendments were directly responsive to contentions made by States Marine.[12]

States Marine voted against the amendments embodied in Agreements 150-29 and 3103-26, and objected to their introduction into evidence.[13] The Examiner ruled States Marine's objection was technically correct,[14] and the Commission, in ruling upon the conferences' motion to clarify or amend its order of investigation so as to allow their introduction, held it unnecessary to place the amendments in evidence. However, the order advised the parties they could refer on brief to any proposals which alleviated the dispute and stated: "Our decision in Docket 1095 will resolve the issues . . . as to what the conferences' self-policing pro-

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[10] Federal Maritime Commission order served November 19, 1964.

[11] These modifications were contained in Agreements 150-29 and 3103-26. They are shown at JA 442-448.

[12] Tr. 1555; JA 179, 180. The particular ways in which they were responsive are documented in Argument II, below.

[13] Tr. 1554; JA 178, 179.

[14] Tr. 1560; JA 182, 183.

visions may and should include and all proposals by counsel will be considered." [15]

The Commission, in its report and order of March 25, 1966, approved the agreements as modified. Its report summarized States Marine's 18 exceptions to the Examiner's decision in seven points and specifically dealt with each one.[16]

States Marine and its susidiary, Isthmian Lines,[17] petitioned this court for review and requested an interlocutory injunction, which was denied.

The background of the adoption of the original neutral body systems was one of severe problems caused by widespread malpractices [18] in the hotly competitive trades served by two conferences (Tr. 423-426, 733-738; JA 68, 89, 90, 91).

The conferences have selected international accounting firms to act as neutral bodies because their accounting expertise, international connections, and high professional character [19] are necessary elements for an effective neutral body (Tr. 429, 761, 791; JA 69, 70, 94, 96).

The current neutral body is Arthur Young and Company, an international accounting firm presently having no financial or professional relationship with any member line. The only similar firm in Japan without such connections is Arthur Anderson and Company, which, like Lowe, resigned

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[15] Federal Maritime Commission order served March 31, 1965; JA 328, 329.

[16] The report is reproduced at JA 393-438.

[17] Petitioners hereinafter will be treated as one and referred to as "States Marine."

[18] A thoroughly documented history of such malpractices on the part of States Marine and its policy of single-handed opposition to the neutral body system is contained in intervenors' Reply Brief before the Commission, at pp. 2-19.

[19] The nature of the accounting profession would prohibit the accountant—neutral body's divulging information obtained in its investigations, and the Code of Ethics of the American Institute of Certified Public Accountants specifically imposes an obligation of confidence upon accountants (Ex. 31, p. 33; Tr. 1416, 1417; JA 167, 168, 274).

its position as neutral body due to the damaging litigation in Docket 920 (Tr. 443, 444, 668, 669, 741, 948; JA 75, 87, 91, 105).

The two previous neutral bodies retained by the conferences have benefitted the trade and have acted as deterrents to malpracticing (Tr. 430-434; JA 70, 71, 72). In TPF, Lowe made nine assessments out of twenty-three complaints. In JAG, Lowe assessed penalties against four lines, handling twenty-three cases, while Arthur Anderson handled three cases and made assessments in two (Tr. 430, 432, 743; JA 70, 91, 92).

Since early 1963, Arthur Young has served as neutral body for both conferences. It conducts its investigations with complete independence, favoring neither exoneration nor malpractice findings (Tr. 969; JA 109). Arthur Young has received two complaints in JAG and four in TPF, all of which primarily have involved cash rebating, and all are presently pending (Tr. 973, 974, 977; JA 110, 111).

Arthur Young's first step upon receiving a complaint is to determine whether it is based on mere suspicion and, if it appears well founded, a surprise inspection of the respondent's records is arranged (Tr. 982-984; JA 111, 112). A malpracticing line must maintain some records for control purposes, and the success of this initial inspection is of the utmost importance, since evidence of rebating is found primarily in these records (Tr. 766, 800, 1014, 1018; JA 95, 97, 117, 119). Arthur Young searches for these records in likely areas, passing over documents not relevant to the complaint and consulting with the subject line's personnel in regard to relevant ones (Tr. 800, 983, 985, 991, 1017; JA 97, 111, 115, 119).

The tendency of a line to remove malpractice records makes surprise of the essence, and Arthur Young uses various techniques to prevent removal (Tr. 434, 437, 985, 1054; JA 71, 72, 73, 112, 124). Arthur Young's investigations

have caused no more inconvenience to respondent lines than audits by the line's own accountants, and Arthur Young has never received a complaint of inconvenience (Tr. 989; JA 113, 114).

Although it was not specifically required under the original Article 25, Arthur Young has uniformly afforded hearings to respondents, the hearing being a final opportunity to rebut the accumulated evidence, since throughout the investigation a dialogue has been carried on with the respondent, affording him opportunity to rebut the evidence as it is discovered (Tr. 986, 1083, 1098, 1099, 1100; JA 113, 135, 138). All evidence is considered in neutral body deliberations, although findings are not based on oral statements, but on documentary evidence (Tr. 1015, 1016; JA 118).

Under Article 25 as approved by the March 25 order, the neutral body may have a professional relationship, such as regular auditor, with any member line, but it must disclose such relationship (JA 444). This type of relationship is harmless and will not impair the independence of the accountant—neutral body, since the neutral body's actions have no more than an indirect effect upon the complainant (Tr. 1154, 1420; JA 148, 169, 170).

A professional relationship with a complainant would not change the way a complaint is handled, nor affect the diligence of the neutral body (Tr. 957; JA 107, 108). In contrast, when the respondent is the neutral body's client, there is a direct effect upon the client's profitability and/or reputation if it is assessed by the neutral body (Tr. 543-545, 957, 958, 1420-1422; JA 107, 108, 169, 170). Such an assessment could place the neutral body in an embarrassing position. (Tr. 955; JA 107).

States Marine suggested its own regular auditors make the investigation and certify their results in the first investigation leading to Docket 920, and still demands its auditors

be the only ones to have direct access to its financial records.[20] Under States Marine's proposed neutral body,[21] the respondent could have his own auditors act as the neutral body's agent in the investigation of a complaint, depriving the neutral body of physical access to financial records (Tr. 186; JA 56).

All three accountant witnesses (including States Marine's) agreed the neutral body must not be denied direct access to records, and the regular auditors of the respondent should not make the investigation, although they saw nothing wrong with the respondent's regular auditors working in conjunction with the neutral body while it made the investigation (Tr. 1315-1321, 1356-1359, 1422; JA 153-155, 156, 157, 170). The intermediary auditor proposal would eliminate the essential element of surprise, and would be particularly unacceptable in the case of foreign lines (Tr. 445, 792; JA 75, 76, 96).

The cost of a neutral body investigation is borne not by the accused but by the conferences pursuant to a fixed retainer arrangement, whether there is an exoneration or an assessment of liquidated damages (Exs. 12, 27; JA 236-238, 272, 273). States Marine, however, prefers a system under which the investigating accountant would be paid by the accused (Tr. 181, Ex. 5; JA 55, 222). Under Article 25(h)(2) of the approved provisions, liquidated damages must be paid over to the conferences.

The conference witnesses agreed disclosure of complainants' identities by the neutral body to the respondent line would severely harm the complainant with shippers, thereby discouraging complaints. Thus, disclosure of evidence to the respondent must not be allowed to include disclosure of

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[20] Placing a responsibility for the investigation upon the accused's own auditor could place him in violation of his Code of Ethics (Tr. 1422-23; JA 170). States Marine's accountant-witness even expressed this opinion (Tr. 1302; JA 153).

[21] Ex. 5; JA 221-226.

the complainant's identity against his will (Tr. 436, 439, 440, 753, 757, 1006; Ex. 6; JA 72, 73, 74, 93, 94).

Showing the actual complaint to the respondent would eliminate the protection of the complainant, and facilitate secretion of evidence if required prior to investigation (Tr. 210, 441, 757, 758, 802, 990, 1376, 1377; JA 57, 74, 75, 93, 94, 97, 114, 115, 158). The respondent must be treated fairly and be allowed to defend himself, but not at such a premature stage that his defense consists in destroying the evidence.[22]

The various criteria for assessments proposed by States Marine are unnecessary (Tr. 567, 895; JA 82, 83, 102). The scale of assessments is fair and reasonable, and past neutral bodies have shown restraint in the exercise of discretion in making assessments, a discretion necessary for neutral body effectiveness (Tr. 777-779; JA 95, 96). The actual amount of fines required for a deterrent effect on member line malpracticing is difficult, if not impossible, to determine, as was pointed out by conference witness McCone who thought an assessment against his company, Pacific Far East Lines, was "a little bit high" (Tr. 436; JA 72).

Conference witnesses testified an arbitration appeal from the neutral body was unnecessary and duplicitous, while it would weaken the neutral body and necessitate the revelation of the complainant (Tr. 438, 490, 514, 515, 517, 521, 676, 753, 790, 859, 1007, 1115; JA 73, 76, 77, 88, 93, 116, 140).

Conference witness Cocke testified the operations of all neutral bodies in JAG have been satisfactory and impartial (Tr. 748, 799, 800; JA 92, 97).

There have been no complaints to Arthur Young about

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[22] This is the meaning of Mr. McCone's testimony, quoted by States Marine at p. 49 of its brief: He stated that complaints should not be dismissed by the neutral body because they don't meet technical standards of notice, that the "accused" will necessarily have an opportunity to defend itself at some point in the investigation, not necessarily at the complaint stage. (Tr. 581, 681; JA 84, 88, 89).

unfairness in its activities (Tr. 986; JA 113). Arthur Young serves as neutral body in the Pacific Westbound and Far East conferences, both of which count States Marine among their members (Tr. 394, 397; JA 65).

STATEMENT OF POINTS

1. Petitioners are without standing to seek review.

2. The Commission properly considered intervenors' latest self-policing proposals.

3. The Commission properly applied the standards in Section 15 of the Shipping Act; in reviewing the Commission's expert judgment, the role of the Court is narrowly confined to determining whether it is supported by substantial evidence and has a reasonable basis in law.

4. Section 15 does not require the disapproval of conference modifications adopted on less than a unanimous vote of its members; there is no basis on this record for disapproving intervenors' presently approved majority voting rules.

5. A provision permitting intervenors' self-policing appointee, known as the neutral body, to have a disclosed and approved "professional or business relationship" does not offend Section 15.

6. The Supreme Court's decision in *Silver* v. *New York Stock Exchange* is persuasive, although the standards which must be applied are those of Section 15.

7. A self-policing provision which accords the accused line notice of the nature of the alleged breach, bearing in mind basic precepts of fair play, and requires disclosure of the actual evidence unless it tends to reveal the identity of the complainant or jeopardize confidentiality does not offend Section 15.

8. According the accused the right to confront his accuser would destroy adequate self-policing; Section 15 does not impose such a requirement.

9. To be effective, investigations of the accused line's books and records must be made directly by the neutral body and without forewarning.

10. Article 25(f)(3) of intervenors' self-policing provisions require that the accused line be given a hearing before it is adjudged: The provision is eminently fair and violates no Shipping Act standard.

11. The absence of enumerated criteria for assessing liquidated damages is not violative of Section 15: There is no evidence of unfairness in past assessments.

12. An appeal from the neutral body's final determination would render intervenors' self-policing system ineffectual, and is not required under Section 15 of the Act.

SUMMARY OF ARGUMENT

Petitioners are without standing to secure review of the Commission's order since they have not suffered deprivation of a legal right nor been injured by the mere approval of intervenors' agreements, thus petitioners are not a "party aggrieved." Being a party in the administrative hearing does not give standing.

If petitioners should be adversely affected by effectuation of the provisions, they are free to appeal to the courts or the Maritime Commission. At such a time they would have a set of facts to litigate, and would not be seeking to litigate imaginary injuries.

The Commission properly considered and approved under Section 15 of the Shipping Act intervenors' latest neutral body proposals, which were adopted during the hearing to alleviate the dispute. These proposals were responsive to petitioners' demands at the hearing. As the Commission forewarned the parties any such proposals would be considered, petitioners were on notice: As the proposals raised no new issues which had not been heard, petitioners were fully heard; and, as the proposals were not evidence of any

disputed fact, but were the end result of the litigation, there was no need that they be placed in evidence. Petitioners have not demonstrated how they were prejudiced by their consideration.

Under the applicable standards, the Commission's Order should be affirmed. The Commission's function is to approve agreements unless it finds they operate in one of the four ways prohibited by the Shipping Act, 1916. Reviewing courts uphold these determinations if they are supported by evidence which a reasonable mind would accept to support the conclusion, and they have a reasonable basis in law, although the court may have reached a different conclusion or may have drawn different inferences from the facts. Courts do not substitute their judgment for that of expert agencies charged with administering congressional policy.

Section 15 of the Shipping Act does not require unanimous voting for purposes of amending conference agreements filed under it. There is no evidence in the record to support a finding that intervenors' majority voting provisions have operated in violation of the Act. There is evidence that a unanimous voting rule, if required in these Japan trades, would provide the petitioning member line the one tool with which it could veto the entire self-policing effort. This would be detrimental to commerce and defeat the congressional mandate for adequate self-policing.

The courts have traditionally upheld the constitutions and by-laws of voluntary associations, and the organizational methods they adopt. It is not unusual for business competitors, even complainants, to participate in disciplinary action against members.

Intervenors' approved self-policing provisions authorize an *outside*, impartial, independent neutral body, traditionally reliable and qualified international accounting firms. The record shows, and the Commission has found, these firms have high standards of professional integrity, unique

qualifications, and worldwide connections permitting rapid and efficient investigations.

Article 25, as approved, permits intervenors to appoint firms of this type though they have a professional relationship with a member line, provided (1) the relationship is disclosed and approved in advance, and (2) is not with a line under investigation. The evidence shows a CPA's impartiality and independence would not be affected because it professionally acts for such a line on matters (e.g., auditing) unconnected with its self-policing duties.

Messrs. Arthur Young & Co., the present neutral body appointee, is the only eligible international accounting firm in Japan without member line connections. There is no guarantee that Arthur Young will not enter into such a relationship.

The Shipping Act does not require disciplinary tribunals of international shipping conferences to fit the judicial mold, any more than the organization and procedures of other voluntary associations must do so. Absent proof of actual bias, plainly not proved on this record, no challenge to the qualifications of such a body should be permitted. Petitioners' authorities, primarily criminal law cases relevant only in protecting the criminally accused, are inapposite.

The Supreme Court in *Silver* v. *New York Stock Exchange* held the Exchange liable for damages under the antitrust laws for discontinuing its wire services to a nonmember broker without giving him some form of notice and opportunity to rebut the charges of misconduct, since this fundamental unfairness exceeded legitimate action under the Securities Exchange Act. Consideration of the question was deemed proper because there was no other forum provided to oversee disciplinary action and prevent such unfairness.

While the facts of *Silver* limit its applicability here, its general principle is persuasive: The evidence of record

shows the approved agreements satisfy the standard of fundamental fairness.

There has been no unfairness in giving notice of charges by any past neutral body, and the approved agreements explicitly provide for fair notice, while not eliminating the surprise element necessary for effective investigations.

The approved agreements require the neutral body disclose all the actual evidence to an accused line, unless confidential informants would be revealed thereby, but it must still reveal the substance of the evidence relied upon for a finding in order that it may be rebutted. Without this slight restriction of the accused line's opportunity to see the results of the investigation, the neutral body would be crippled by the resulting absence of complaints. No authority applicable here requires more.

The testimony overwhelmingly supports the finding that the actual investigation must be made by the neutral body, who may not have a professional relationship with the accused line, rather than by the accused line's own auditors, to preserve the surprise nature and effectiveness of investigations. There is no evidence supporting the supposition that neutral bodies will disclose competitive secrets, but there is evidence that past investigations have not inconvenienced the respondents.

The record shows past neutral bodies have given fair hearings, and the approved agreements specifically require they do so in the future.

Past neutral body assessments have been fair, and all conference members except petitioners believe the enumeration of specific criteria for assessments is unnecessary, thus there is no basis for requiring such criteria.

Neither *Silver* nor any other authority requires a provision for an appeal from the neutral body's determinations, and the conference members are of the opinion an appeal is unnecessary and would weaken the neutral body.

ARGUMENT

I. States Marine is Without Standing to Secure Review of the Commission's Order

A jurisdictional issue is presented as to States Marine's standing to secure review of the Commission's order. It requests this Court to review the Commission's order approving these self-policing provisions, despite the fact it has not been adversely affected by that order.

The approved provisions have not been applied against States Marine during the many months since their approval. Should they be so applied, it is pure speculation to anticipate they will be applied unfairly, but States Marine is always free to seek redress for any alleged unfairness in the courts or before the Commission, under the Shipping Act. At such a time, it would have an actual case to present for determination. Here, it has none.

States Marine alleges jurisdiction under Section 4, Judicial Review Act of 1950, 64 Stat. 1130, 5 U.S.C. §1034, which states: "any party aggrieved by a final order . . . may . . . file . . . a petition to review such order." In a recent appeal [23] under this provision by the Government of Guam, from an order approving rate increases in the trade between the United States and Guam, this Court held a party to a proceeding before the Commission is "aggrieved" within the meaning of the statute, only if that party is "adversely affected" by the order.

The fact that one is a party to a proceeding before an administrative agency does not confer standing to obtain review.[24] Parties who have had their day before an agency cannot appeal wholesale, but must show their interests are

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[23] Government of Guam v. Federal Maritime Commission, 117 App. D.C. 296, 329 F.2d 251 (1964).

[24] Boston Tow Boat Co. v. United States, 321 U.S. 632 (1944); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Moffat Tunnel League v. United States, 289 U.S. 113 (1933); Seatrain Lines v. United States, 152 F.Supp. 619 (D. Del), *aff'd* 355 U.S. 181 (1957).

affected intimately enough to justify subjecting the determination of the agency to judicial review.

The Supreme Court's decision in *Bantam Books* v. *Sullivan*[25] is instructive on the requirement of standing to seek review: Holding a book publisher could challenge the constitutionality of a state obscenity commission which had impaired the sales of certain of plaintiff's books, the court stated the two tests for standing were infliction of a "legal wrong" and "a palpable injury." Neither test is met here. Approval of provisions not written to suit States Marine's taste is not a legal wrong, and there is no effect until and unless the provisions are applied against it.

In *Pennsylvania Railroad Co.* v. *Dillon*,[26] competitors claimed documentation of partially foreign-built vessels for the coastwise trade was illegal, but this Court held them without standing, since they had suffered neither legal wrong nor were they adversely affected or aggrieved. The Court held the speculative injury of competitors securing lower construction costs was insufficient to give standing.

States Marine's injuries here are so much the more speculative, for they rest on the pessimistic and gratuitous assumptions, unshared by the other parties, that the neutral body will receive a complaint against it; that the neutral body will find it sufficiently meritorious, after preliminary investigation, to justify holding a hearing; and that the neutral body will be in some manner unfair to States Marine.

Only if these unfounded fears materialize will States Marine suffer a legal wrong and be adversely affected. If they do materialize, it is free to secure redress from the Maritime Commission under Section 15 of the Shipping Act, 1916,[27] or in the courts.

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[25] 372 U.S. 58 (1963).

[26] 118 App.D.C. 257, 335 F.2d 292 (1964), *cert. den.* 379 U.S. 945.

[27] 39 Stat. 733, 46 U.S.C. §814, as amended.

States Marine's dramatic portrayals of neutral body activities at other times and other places are inaccurate and are no substitute for the requisite adverse effect. One need only read the opinion of the Commission's predecessor, detailing the situation pointed to by States Marine as an example of unfairness,[28] to see there was nothing unfair in the conduct of the neutral body in that situation. That decision merely held, where a clause in a conference agreement stipulates a neutral body should not be "employed by" any party to the agreement, a neutral body accounting firm whose correspondent audited the books of a member line was "employed by" that member and could not serve. The neutral body was appointed with knowledge of such a relationship on the part of the appointing committee, but the Commission's predecessor held an auditor came within the category of one who was "employed by."

The assessments complained of by States Marine in that case were for refusal of access to records, an extremely serious offense,[29] since it renders impossible the neutral body's functioning. If the neutral body had refrained from an assessment for the refusal of access in the second case, it would not have been executing the duties it had contracted to perform, and, if the conference reined its neutral body to a halt each time a question was raised concerning its operations, each party would be allowed to exercise a kind of discretionary interim cease and desist power. The assessment for a $93 undercharge mentioned by States Marine comes into perspective when it is considered any given undercharge may divert thousands of dollars in cargo to the undercharging carrier.

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[28] Sates Marine Lines, Inc. v. Trans-Pacific Freight Conference of Japan, 7 F.M.C. 204 (1962). The accurate facts are set forth in the Counterstatement of the Case, above.

[29] Tr. 436; JA 72.

Where a private litigant is seeking to vindicate the public interest, it has been stated:[30]

> [I]n order to avoid clogging the Courts by reason of mass vindication of the public interest by anyone who might be so inclined and because of the constitutional requirement of 'case or controversy,' the one bringing suit must also show personal injury of a substantial character in order to have standing . . . (152 F. Supp. at p. 625).

In its unsuccessful request for an interlocutory injunction, States Marine was unable to adduce any facts showing it was adversely affected by the order or in imminent danger of being so affected. It can show no infringement of its legal rights, nor can it show any effect justifying appellate litigation in a vacuum of numerous imaginary problems. Allowance of this appeal would provide a classic example of clogging the courts with parties unable to show any personal injury. Intervenors submit this Court should dismiss the appeal.

II. The Commission Properly Considered Intervenors' Latest Self-Policing Proposals Which Were Designed to Narrow the Controversy

States Marine claims[31] the Commission could not approve intervenors' most recent self-policing proposals (numbered as Agreements 150-29 and 3103-26) because they had not been noticed for hearing or admitted into evidence, but argues only to the latter point. The administrative law requirement of substantial evidence is relied upon to support the contention that the Commission could not approve proposals which were not "in evidence."

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[30] Seatrain Lines v. United States, 152 F.Supp. 619 (D. Del), *aff'd* 355 U.S. 181 (1957).

[31] States Marine Brief, pp. 26-31.

In considering these self-policing modifications for approval, the Commission rejected States Marine's argument they "were not in evidence and not in issue."[32] It held Agreements 150-29 and 3103-26 raise no new issues, rather they narrow the issues by remedying defects alleged by States Marine, and the order of March 31, 1965, specifically stated such modifications would be considered.[33] Thus, States Marine was put on notice that precisely such proposals as these would be considered, as it could serve no useful purpose to prolong the already protracted proceeding.

This Court has held an agency's refusal to consider a settlement proposal filed with it after the close of hearings reversible error, where it appeared the proposal was consistent with the agency's statutory objective.[34] It has also affirmed an agency's determination attaching curative conditions to a proposal without holding another hearing on the conditions, stating:

> Petitioner says it should have been heard, because the conditions transformed the proposal into an entirely new proposition. We think not. The conditions only resolved issues raised, argued and briefed in the hearing. They involved no surprises except insofar as they may have gone farther or not so far as petitioner would have wished.[35]

These comments apply equally well here. States Marine appeared at the hearing, and elicited testimony on every conceivable issue having any relevance to self-policing. Its contentions included allegations self-policing agreements were legally deficient (1) because of the jurisdictional overlap and ambiguity between Articles 10 and 25 (Tr. 507, 698,

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[32] Commission Report, pp. 2, 6 & 7; JA 394, 395, 399-401.

[33] Commission Order, served March 31, 1965; JA 328, 329.

[34] Michigan Consolidated Gas Co. v. Federal Power Commission, 108 App.D.C. 409, 283 F.2d 204, 224 (1960), *cert. den.* 364 U.S. 913.

[35] Florida Economic Advisory Counsel v. Federal Power Commission, 102 App.D.C. 152, 251 F.2d 643, 648, 649 (1957), *cert. den.* 356 U.S. 959.

805-808; JA 76, 89, 98); (2) because they contained no period of limitation upon neutral body investigations (Tr. 568-570; Exs. 5, p. 8; 7; 26, p. 7; JA 83, 225); (3) because of their failure to require consideration of specific mitigating circumstances in the assessment of liquidated damages (Tr. 561-571, 888, 895, 1122-1128; JA 79-83, 101, 102, 142-145); (4) because they had no provision requiring the respondent be advised of exonerations (Tr. 589-590, 823, 1080-1083; JA 85, 133, 134); (5) because the neutral body could make a tentative decision of "guilt" (Tr. 1099-1105; JA 138); (6) because the respondent was afforded insufficient time to prepare a defense (Tr. 862-864; JA 101); (7) because the neutral body was not required to furnish the respondent with all the actual evidence (Tr. 803, 820, 825-826, 848; JA 97, 101); (8) because the neutral body was not required to consider all of the relevant evidence and base its decision upon such evidence (Tr. 77; Ex. 10; JA 50); (9) because of the neutral body's indeterminate evidentiary standard (Tr. 836, 917; Ex. 3, p. 6, para. 9; JA 103, 227, 228); and (10) because the neutral body was not required to be "neutral" (Exs. 1 & 2, pp. 3 & 4; JA 211-213, 220).

Intervenors substantially reduced the area of controversy by meeting the foregoing contentions. By conference action in Tokyo on January 8, 1965, with States Marine present, modifications were adopted in response to these contentions.[36] These modifications were filed with the Commission and identified as Agreements 150-29 and 3103-26.[37]

At the January 8 meeting, States Marine's representative did not question or discuss any of the proposals but merely voted against them. Then States Marine secretly protested the proposals before the Commission, urging it not to include the proposals for consideration in the pend-

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[36] Exs. 82 & 83; JA 279-293.

[37] Commission Report, p. 2; JA 394, 395.

ing docketed proceeding.[38] Yet, the modifications accommodate, wholly or in part, the very complaints against intervenors' self-policing system which States Marine had made at the hearing:

SML Contention (1): A new Article 10(a) was adopted, and Articles 25 (b) (1) and 25 (f) (1) were clarified, eliminating any possible "overlap."

SML Contention (2): A two year period of limitations was inserted into Article 25(b)(3).

SML Contention (3): The second paragraph of Article 25(f)(4) was rewritten, requiring consideration of mitigating circumstances.

SML Contention (4): Articles 25(f)(3) and (4) were amended to require the respondent be advised of exonerations.

SML Contentions (5), (6), (7) and (8): Article 25(f)(3) was deleted and the notice and hearing provision revised to explicitly require rights which have customarily been granted, and which were deemed granted in the proposed Articles (Exs. 1 and 2).

SML Contention (9): The standard of proof the neutral body must follow has been raised by deletion of the word "probably" from Article 25(f)(2).

SML Contention (10): Articles 25(a) (2), (3), and (4) have been amended to:

1. Require neutral body candidates to divulge to the conference *any* "professional or business relationships or financial interests" instead of only *material* interests;

2. More clearly sanction the use of a neutral body, or agent thereof, with a disclosed "professional or business relationship" with a member line in the sense

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[38] Ex. B to Respondents' Motion to Clarify or to Amend Order Reopening Proceeding, filed February 24, 1965.

that it is an 'independent contractor'' for ''professional or business services''; and

3. To disqualify a neutral body with any other interest, designated under the broad category, ''financial interests.''

States Marine availed itself of the opportunity to present evidence at the hearing on all these issues, which it had formulated. It was, therefore, in no way prejudiced by the Commission's consideration of these conciliatory proposals.

The Commission forewarned the parties, in its order of March 31, 1965, it would consider ''any proposals for modification of the contested clauses which alleviate the disputes between the parties'' and offered them the opportunity to set forth such proposals on brief. In its Exceptions to the Initial Decision, States Marine informed the Commission it had been denied a hearing by reason of its inability ''to cross examine . . . conference or neutral body witnesses as to the meaning or projected operation of the 'fair play' concept.'' [39] After explicitly delineating the type of notice an accused line is to be given, the statement is made: ''in all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play.'' States Marine was present when the conferences adopted this provision, thus, any background is known to it. Its curiosity about the term's meaning raises no factual issue. As the conferences advised the Commission,[40] ''fair play'' is a commonly used general term which will serve as a beacon to guide the neutral body in its deliberations. A hearing for the purpose of speculating upon its future application would be an exercise in futility.

The proposals which the Commission approved were not evidence, they were the end result of the litigation. They

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[39] States Marine Exceptions, p. 24.

[40] Respondents' Reply to Exceptions, p. 19.

were a part of the remedy which the conferences adopted and the Commission devised, having found no evidence upon which a disapproval could be based. States Marine has never disputed the existence or adoption of the proposals or what they contain, nor has it explained how placing the proposals in evidence could have changed the result the Commission reached. It is not contended the evidentiary presence of these proposals would have afforded a basis for their disapproval. States Marine was in no way prejudiced by these proposals' acceptance into evidence for a limited purpose, nor by the denial of further opportunity to hypothesize as to their future operation.

III. Under the Applicable Standards, the Commission's Order Should Be Affirmed.

A. The Standards Applied by the Commission

The standards applied by the Commission in approving intervenors' agreements are those contained in Section 15, Shipping Act, 1916, as amended, and as interpreted by the courts. Section 15 states:

> The Commission shall . . . after notice and hearing, disapprove . . . any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Chapter, and shall approve all other agreements, modifications or cancellations.
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> The Commission shall disapprove any such agreement . . . on a finding of inadequate policing of the obligations under it. . . .[41]

In *Aktiebolaget Svenska Amerika Linien* v. *F.M.C.*,[42] this Court stated the Maritime Commission could not disapprove

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[41] 39 Stat. 733, 46 U.S.C. §814, as amended.
[42] 122 App. D.C. 59, 351 F.2d 756 (1965).

an agreement unless it could make supporting findings on the record adequately sustaining the ultimate finding that the agreement operates in violation of the statutory standards, and if unable to make such findings, it *must* approve.[43]

In the 1961 amendments to the Shipping Act, inserting the requirement of disapproval on a finding of inadequate policing, Congress explicitly refrained from giving the Commission responsibility for prescribing the procedures of self-policing mechanisms: A sentence was contained in the amendment (H.R. 6775) as it passed the House and was published on August 8, 1961, stating the Commission "may prescribe general standards of organization and procedure with respect to conference policing. . . .",[44] but the sentence was deleted in a conference on the differing House and Senate versions.[45]

The Celler Committee found the neutral body an especially suitable mechanism for shipping industry self-policing, because it can maintain the confidentiality of complainants' identities; has the advantage of being a "non-governmental, independent agency"; and "need not be bound by formal rules of evidence and procedure."[46]

The procedures required of conferences should be no more rigorous than those required of other voluntary associations.[47]

B. The Standards to be Applied by The Court.

In *Alcoa Steamship Co.* v. *Federal Maritime Commission*,[48] this Court stated that determinations under the standards of Section 15 obviously turn upon a determination of

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[43] *Id.*, at p. 760.
[44] Senate Doc. No. 100, 87th Cong., 1st Sess., p. 608 (1961).
[45] H.Rept. 1247, 87th Cong., 1st Sess. (1961).
[46] Antitrust Subcommittee of the House Committee on the Judiciary, *The Ocean Freight Industry*, H.R. Rep. No. 1419, 87th Cong., 2d Sess. (1962).
[47] These requirements are set forth in Argument IV, below.
[48] 116 App. D.C. 143, 321 F.2d 756 (1963).

facts—"a function committed by Congress to the Commission, an expert body whose findings in this regard are not lightly to be disregarded by a reviewing court." The opinion further stated the Court "must uphold the Commission's order if it is supported by substantial evidence on the record as a whole and has a 'reasonable basis in law.'"[49] Concluding the Commission's findings as to the effect of a Section 15 agreement were supported by substantial evidence, the Court held it had "no basis for rejecting them without substituting [its] judgment in this specialized area for that of the body best qualified to exercise it."[50]

The Supreme Court recently applied the substantial evidence test to a Maritime Commission decision, pointing out it had defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"[51] and "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[52]

States Marine carries an immense burden in attempting to overthrow the Commission's approval since, lacking evidence on which to base a disapproval, the Commission must approve agreements filed with it.[53] Thus, States Marine must prove the evidence of record showing violation of the standards of Section 15 so overwhelms intervenors' evidence to the contrary that the Commission had no choice but to disapprove. On this record, it cannot begin to approach this goal.

The observations made in *North Central Airlines, Inc.* v.

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[49] *Ibid.*

[50] *Id.*, at p. 760.

[51] Consolo v. Federal Maritime Commission, —— U.S. ——, 16 L. ed. 2d 131, 140 (1966).

[52] *Id.*, at p. 140, 141.

[53] Aktiebolaget Svenska Amerika Linien v. Federal Maritime Commission, *supra* at note 42.

Civil Aeronautics Board[54] are pertinent here: The Civil Aeronautics Board found the combination of two airline feeder services into one was inconsistent with the public interest and denied approval of the acquisition contract. In affirming, this Court pointed out the parties disagreed on the inferences to be drawn from the factual data, but stated "it is not our function to draw inferences. Our function is to ascertain whether the inferences drawn by the administrative agency are within the reasonable boundaries prescribed by the facts."

This Court is in the same position as in the *North Central* case. There are really no disputes of fact, only disputes over inferences, opinions, and prophecies as to the operation of the agreement provisions. The Commission's findings, drawn from among these, are not unreasonable and must be affirmed.

The approach to review of this order, issued by the expert body which carries the responsibility for determining the adequacy of conference self-policing provisions, should be:

> [T]hat this determination by the Board was a matter committed to it as an expert in the field and that this court should not pit its view against that of the Board. The great complexity of our economy induced Congress to place the regulation of businesses like foreign shipments in specialized agencies with broad powers. The courts are slow to interfere with the conclusions of such agencies when reconcilable with statutory directions.[55]

IV. Section 15 of the Shipping Act Does Not Require Adoption of Conference Modifications by Unanimity, Nor is There any Evidence to Support the Disapproval of Intervenors' Approved Majority Voting Provisions.

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[54] 105 App. D.C. 207, 265 F.2d 581 (1959) *cert. den.* 360 U.S. 903.

[55] American Union Transport, Inc. v. United States, 103 App. D.C. 229, 257 F.2d 607, 612 (1958) *cert. den.* 358 U.S. 828.

States Marine argues the statutory language of the Shipping Act, and its purpose, dictate veto power in the hands of every party to a conference agreement modification, pointing to Section 15, which requires only the filing of agreements "to which . . . [the carrier] may be a party or conform in whole or in part." It also asserts the Commission, in treating the unanimity issue, failed to make a reasoned decision supported by substantial evidence.[56]

Clearly, a non-assenting carrier to a change in a conference agreement does not necessarily cease to be "a party" to the change in the statutory sense. Whether it does depends upon the conference's applicable voting provisions. Articles 18 and 19 of the present conference agreements contain majority voting procedures under which the member lines have agreed to function as a voluntary association.[57] States Marine is either "a party" in the statutory sense to these agreements, and also to the changes regularly made under them, or not. Persons joining associations receive the benefits and are subject to the regulations and procedures thereof. [58]

Fifteen days before States Marine filed its Brief, this Court, construing Section 15, held:

> The statute in no way proscribes unanimity as such, and the question remains one of whether a unanimity requirement in a particular case is incompatible with

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[56] States Marine Brief, p. 19-26.

[57] TPF and JAG had majority voting provisions when States Marine joined. When the majority required was reduced in 1952, it made no objection (Exs. 86-92; JA 294-300).

[58] See: Rachford v. Indemnity Insurance Co., 183 F.Supp. 875, 879 (S.D. Cal. 1960). States Marine's rules of private contract law apply only to contracts where the relationship of the parties is fixed by offer and acceptance, and changes are made by novation or a renegotiation provision. Intervenors' agreements provide that the association agreement is changed by vote, and parties may join freely.

> some one or more of the concerns of Congress exhibited in the statute.[59]

The language of Section 15 requires no particular quantum of votes for adoption of agreement modifications. Congress has refused "to legislatively mandate an answer" to the question of the vote required for conference action.[60]

States Marine also asserts the Commission's readoption of the "finding" that a majority amendment rule is necessary in order for conferences to function "with as little friction and obstruction as possible" is unsupported by substantial evidence.[61]

The Commission's previous decision did not "find" majority voting rules were necessary to reconcile divergent interests and to resolve intraconference friction.[62] It merely held unanimity was not statutorily required under Section 15, and there was nothing in intervenors' voting rule "as applied to the proposed modifications" which rendered the rule violative of any of the four statutory standards.[63] On remand, it specifically affirmed these findings, stating,

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[59] U.S. Atlantic & Gulf/Australia-New Zealand Conference v. Federal Maritime Commission, et al., U.S. Court of Appeals for the District of Columbia, No. 19,704, decided June 30, 1966. Because States Marine is opposed to democratic voting procedures does not make those procedures "inherently a weapon of oppression", or prove it will be "forced" to drop out of the conferences.

[60] Senate Committee on Commerce, *Steamship Conferences and Dual Rate Contracts*, Sen. Rep. No. 860, 87th Cong., 1st Sess. (1961); House of Rep., Committee on Merchant Marine and Fisheries, *Investigation of Shipping Combinations*, 62nd Congress, Vol. 3, pp. 56 & 169 (1913).

[61] States Marine Brief, p. 26.

[62] But, its decision following remand did observe that "unanimity could well work to increase rather than decrease friction among the members of the conferences"; "the record here clearly demonstrates" had unanimity been in force "there would be no Neutral Body system"; therefore respondents' attempts to satisfy their statutory self-policing obligation "would be frustrated", which would be "contrary to the public interest and detrimental to commerce."

[63] Commission Report, pp. 18, 19; JA 413-415.

"States Marine has offered nothing which causes us to change our views. . . ."[64]

Drawing upon its experience, the Commission did broadly state that a conference shipping agreement (as distinguished from an ordinary private contract) must provide for the continuing commercial operations of a relatively large number of conference members "with as little friction and obstruction as possible." This was not a finding that majority voting rules "are necessary" to achieve the result. It was rather an expert commentary upon the differences between ordinary private contracts and conference shipping agreements, prompted by States Marine's statutory argument the language of Section 15 dictates the automatic disapproval of amendments reached upon less than unanimity.

V. The Qualifications Criteria in Intervenors' Self-Policing Provisions for Serving as Neutral Body Offend No Shipping Act Standard in Law or on the Evidence.

States Marine's neutrality argument is that a showing of actual bias is never required under the law for disqualification of judges, arbitrators, or any other kind of decision maker,[65] citing, however, only criminal cases involving constitutional deprivation by governmental action.[66] These cases are inapposite. *Tumey* found a violation of Four-

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[64] *Ibid.* States Marine's distorted exposition of the evidence (States Marine Brief, pp. 23-26) "against" intervenors' majority rules is unavailing, for it matters not how often unanimity has been achieved nor how many conferences have unanimous voting provisions when tested against a statute which requires a showing of contrariety—not furtherance of its policies. See: Intervenors' Brief before the Examiner, pp. 45-47, for a discussion of this evidence.

[65] States Marine Brief, p. 37.

[66] United States v. Manton, 107 F.2d 834, 846 (2d Cir., 1938), *cert. den.* 309 U.S. 664; Tumey v. State of Ohio, 273 U.S. 510, 532 (1927); United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549-50 (1961); S.E.C. v. Capital Gains Research Bureau, 375 U.S. 180 (1963); and Ruiz v. Delgado, 359 F.2d 718 (1st Cir., 1966).

teenth Amendment due process where a judge in a criminal trial would not have been compensated if the defendent were acquitted. The neutral body is not a criminal court, nor does its fee depend upon the finding of a malpractice. *Mississippi Valley Generating* was a case decided under a since-repealed conflict of interest statute.[67] The statute incorporated an objective standard eliminating the need for proof of actual bias where a person acted as agent for both the government and a private contractor in *the same transaction.* The neutral body would not be so constituted, its self-policing client being the conference and its auditing client being such a disclosed member line (not the accused) as the conference may choose to permit. *Capital Gains* also involved a disclosure statute, similar to Article 25, designed to achieve high standards of ethics. It did no more than require revelation to clients by investment advisers of their personal interests in recommendations. Like Article 25, the statute does not prohibit stock trading once disclosures are made. *Delgado* merely involved a criminal statute which merged the prosecution and decision-making functions: Intervenors have never disputed those procedural standards which have evolved to protect the criminally accused.

Whatever the constitutional or statutory proscriptions for administrative or other governmental action, the standard of fairness for action by private individuals is much less technical. The simplicity or complexity of the disciplinary machinery of voluntary associations will vary according to their size, purpose and the particular prevailing circumstances. Intervenors, instead of deciding the fate of their own fellow competitors, have chosen an *outside* firm of ac-

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[67] Section 434 of Title 18, U.S. Code, was repealed by Section 208 in 1962. The new statute is much like intervenors' full-disclosure provision, as it permits certain dual relationships provided there is prior disclosure of the financial interests involved. The new statute is more liberal than intervenors', as it sanctions the serving of two masters respecting the same transaction.

countants whom they may permit to have certain disclosed relationships (i.e., independent contractor for professional or business services—exclusive of relationships involving "financial interests"). The courts have never required such devices to fit the judicial mold. Thus, the internal activities of voluntary associations, carried out according to the rules of the association and binding only upon the members thereof, are not a due process matter, and will not be inquired into by the courts unless they violate some statute or public policy.[68] Where the action taken is expulsion of a member,[69] the courts will condemn arbitrary procedure, but do not apply technical standards or examine the merits of the question, requiring only the preservation of fundamental rights, if the association observes standards of fair play or natural justice.[70]

In *Avery*, it was held "when the rules of voluntary associations [the New York Stock Exchange] are followed, the courts will not interfere with the disciplinary action taken against a member solely because the charges are preferred by a member of the governing board which is to try the case." [71] In *Mayfield* [72] it was contended the membership of business competitors on the ethics committee deprived Mayfield of a fair hearing. The court rejected the contention because there was no evidence of actual bias, and "proceed-

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[68] Talton v. Behncke, 199 F.2d 471, 474 (7th Cir. 1952).

[69] Compare the neutral body's more limited authority to assess liquidated damages after hearing and after considering the relevant mitigating circumstances.

[70] Avery v. Moffatt, 55 N.Y.S. 2d 215, 223, 228 (Sup. Ct. 1945) where "the more indefinite, although compelling, standards of fair play or natural justice applicable to proceedings conducted by a voluntary association on a contractual basis" were applied. See Also: Comment, 59 Northwestern Univ. Law Review, 70, 73, 74 (1964), discussing *Siver* and *Avery*; Westwood & Howard, "Self-Government in the Securities Business," 17 L. & C. P. 518, 529, 530 (1952); 7 Am. Jur. 2d Associations & Clubs §§28, 32, 35, & 36.

[71] 55 N.Y.S. 2d at p. 222.

[72] State ex rel. Mayfield v. St. Louis Medical Society, 91 Mo. App. 76 (1901).

ings to try a member in organizations of this kind are not required to be as formal or technical as a trial at law." Similarly, in trade practice cases heard before local committees of the National Association of Securities Dealers, which initiate, hear and decide complaints, it is permissible and desirable that the accused member's fellow competitors hear complaints against him.[73]

The broad congressional mandate aimed at eradicating unfair trade practices *in international trading*,[74] viewed in light of those principles which have historically governed the proceedings of voluntary associations (whether regulated or exempt from the antitrust laws), lends support to the Commission's expert determination that the carefully delineated relationships here do not legally offend any Shipping Act standard. Thus, as there is no substantial evidence in the record to support a finding of disapproval, and as the Commission's expert determination is supported by the weight of evidence,[75] States Marine's "neutrality" argument will not stand.

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[73] In the Matter of National Association of Securities Dealers, Inc., 17 S.E.C. 459 (1944).

[74] "The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it . . ." Section 15, Shipping Act, 1916, 39 Stat. 733, 46 U.S.C. §814, as amended.

[75] It is asserted there is no evidence in the record upholding the Commission's finding (States Marine Brief, pp. 33-37): (1) Obviously, the neutral body functions are not judicial in the sense it presides over an adversary system of justice (p. 33); (2) As documented herein, evidence of rebating is primarily obtained from the books and records of the accused (p. 34); (3) Accounting firms are well qualified to make determinations and resolve conflicts (Tr. 1131-1133; JA 145, 146) (p. 35); (4) The neutral body (auditor)-member line professional relationship creates no conflict. (Tr. 442, 749, 800, 950-953, 957, 997, 1154, 1417-23; JA 75, 92, 97, 105, 107, 148, 168) (p. 36); (5) Fees are paid the neutral body by the conference on the basis of time and without regard to whether a malpractice is sustained or dismissed (Exs. 12, 17; JA 236-238, 241); (6) As stated, none of the accounting firms heretofore used has been found to harbor actual bias (p. 37); (7) The record clearly shows that the failure to permit such professional relationships would disqualify

VI. The Commission's Order Is Upheld by the Evidence and the Law.

A. Silver v. New York Stock Exchange.

By virtue of States Marine's reliance on *Silver* v. *New York Stock Exchange*,[76] its applicability must be treated. The opinion in *Silver* presents most concisely the issues dealt with therein:

> [T]he question* is whether the New York Stock Exchange is to be held liable to a nonmember broker-dealer under the anti-trust laws or regarded as impliedly immune therefrom when, pursuant to rules the Exchange has adopted under the Securities Exchange Act of 1934, it orders a number of its members to remove private direct telephone wire connections previously in operation between their offices and those of the nonmember, without giving the nonmember notice, assigning him any reason for the action, or affording him an opportunity to be heard. (373 U.S. at p. 343.)
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> The fundamental issue confronting us is whether the Securities Exchange Act has created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our anti-trust laws, thereby exempting the Exchange from liability in this and similar cases. (373 U.S. at p. 347.)

Answering these issues, the Court held: "Congress . . . cannot be thought to have sanctioned self-regulatory activity when carried out in a fundamentally unfair manner."[77]

The source of antitrust liability was traced to the fact that, in the Court's words:

> [I]n acting without according petitioners these safeguards *in response to their request*, the Exchange has plainly exceeded the scope of its authority under the

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or bring the disinterest of the otherwise eligible accounting firms (Tr. 428, 429, 445, 759, 947, 948, 996, 1008, 1032; JA 69, 70, 75, 94, 105, 116, 120) (p. 37).

[76] 373 U.S. 341 (1963).

[77] *Id.* at p. 364.

Securities Exchange Act to engage in self-regulation . . . (Emphasis supplied.) (373 U.S. at p. 361.)

The Exchange was subjected to antitrust liability because "the statutory scheme of the [Securities Exchange] Act is not sufficiently pervasive to create a total exemption from the antitrust laws . . .,"[78] and "no justification can be offered for self-regulation conducted without provision for *some method* of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation in his position." (Emphasis supplied.) (373 U.S. at p. 365.)

States Marine reads into the *Silver* opinion a holding that a regulatory agency may not grant approval, with its concomitant antitrust exemption, of a self-policing system which does not provide: (a) that the "notice" given must include identification of complainants in all cases; (b) that all original evidence in the hands of the policing agent must be disclosed to the respondent; (c) that all individuals furnishing information to the policing agent must be made available for cross-examination; and (d) that all respondents may appeal to arbitration from the Neutral Body's decision. Nothing resembling such a rule can be found in the opinion.

The Court went no further than to require "some method" of informing the party of the reasons for the action, and allowance of an explanation. It condemned the Exchange only for denying Silver's requests to be "informed of the charges underlying the decision" and to be allowed to "explain or refute the charges."[79]

The Exchange was held remiss in neither "explaining its basis for action" nor giving "some form of notice and, if timely requested, a hearing . . ."[80] The desideratum is that "the *basis* of the charges be laid bare, [and] the explanation

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[78] *Id.*, at p. 361.
[79] *Ibid.*
[80] *Ibid.*

or rebuttal offered by the nonmember will in many instances dissipate the force of the ex parte information . . ." (Emphasis supplied.) (373 U.S. at p. 362.)

These pronouncements delineate no strictures such as advocated by States Marine. That the standard of fundamental fairness applied is no more exact than that required of all associations is demonstrated by the Court's equation of the two.[81]

Only the basic nature of the charges need be set forth, and opportunity for explanation given. The statement quoted above expressly contemplates that decisions *can* be made on the basis of *ex parte* information after such opportunity has been afforded. Given the general guideliness of the approved system, which comport with the requirements of *Silver*, there should be no great difficulty in reasonable men reaching agreement upon what is fundamentally fair in a given situation. If there were insurmountable difficulty, the neutral body system would hold out little hope for solution of the problem of conference self-policing.

In discussing the absence of power in the Securities and Exchange Commission to review particular instances of enforcement action,[82] the Court never suggested such review should consider the merits of those instances, nor did it hold that an appeal procedure must be set up for future Exchange disciplinary action, but only recognized, quoting the Chairman of the S.E.C., that some government review is necessary to guarantee self-regulatory action would be "neither discriminatory nor capricious."[83] This form of review is always available under the provisions of Section 15 of the Shipping Act, 1916,[84] and in the courts.[85]

The *Silver* case, being a decision imposing antitrust liability because the unfairness of self-regulatory action exceeded

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[81] *Id.*, at p. 364, Footnote 17.
[82] 373 U.S. at p. 357-360.
[83] 373 U.S. at p. 359.
[84] 39 Stat. 733, 46 U.S.C. §814, as amended.
[85] See cases cited, *supra*, n. 70, 72.

the scope of the authorizing statute, is not in point in a case where an agency has granted an express antitrust exemption for self-regulatory procedures. The Commission has performed the function delegated it, determining whether the self-policing provisions are fair, before granting the antitrust exemption. As the Commission's report stated, *Silver* is "persuasive," since the Commission would hardly sanction a system which operated in a fundamentally unfair manner. As the report found, the approved provisions satisfy the standard of fairness.

B. Notice.

The approved agreement provisions direct the neutral body, after its investigation, to notify the respondent no breach has been found, or reasonable grounds exist to believe one occurred. If the latter, the respondent must be informed of the "nature of the alleged breach," and the neutral body must "disclose the *actual* evidence which it has at its disposal unless . . . disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the neutral body's sources of information." But the neutral body must always "inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play."

As the Commission found,[86] these provisions comport with the standards of *Silver* and are fundamentally fair. The testimony of all conference witnesses was that notice before investigation would allow concealment of the crucial documents, thus surprise is of the essence for a successful investigation.

States Marine's attack on the Commission's findings[87] is based on alleged unfairness in an investigation in the Pacific Coast-European Conference (about which, strangely

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[86] Commission Report pp. 10, 11; JA 404-406.
[87] States Marine Brief, pp. 47-49.

enough, it never complained to the Commission) and on an inaccurate presentation of the facts in the Docket 920 case.[88] States Marine also presents a theory that the neutral body is at the mercy of the lines, insofar as finding malpractice records, pressing the illogical argument that this alleged helplessnesses of the neutral body is reason for stripping it of all powers.

The record contains neither evidence of past unfairness by a neutral body nor grounds to anticipate future unfairness. Neutral body witness Waldroup testified no line had ever complained to him of unfairness, and the conference witnesses testified the neutral bodies had always acted fairly.

C. Confrontation.

Under the approved Article 25(f)(3), the neutral body must disclose all the actual evidence at its disposal unless to do so would jeopardize the confidentiality of its sources of information. If it must withhold the actual evidence for this reason, the neutral body is adjured to consider only the evidence made available at the hearing in making its determination. Thus the Examiner,[89] and the Commission,[90] correctly interpreted the amendments to require that the neutral body need not disclose all the actual evidence on which it bases its decision, but must disclose the substance of that evidence in sufficient detail to permit the respondent to rebut it. Therefore, the hypothetical situation presented to Mr. Waldroup on cross-examination[91] will not occur under the approved provisions.

States Marine's basic disability in analyzing the issues of confrontation and identification of the complaint is its failure to appreciate that courts, in determining what is

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[88] Set forth accurately above in the Statement of Case.
[89] Initial Decision, pp. 15, 16; JA 350-352.
[90] Commission Report, p. 13; JA 407, 408.
[91] Quoted in the States Marine Brief, p. 52.

fair, whether under the Constitution or under the principles of natural justice governing voluntary associations, never apply abstract principles recklessly. Fairness is determined only upon consideration of particular, factual circumstances.[92] Unfairness will not be anticipated from the absence of any specific written requirements,[93] and the rights afforded one against whom action is taken are determined by balancing the importance of any interests necessitating restriction of these rights. In no situation, certainly not under the standards applied to voluntary associations, will the courts fly in the face of a serious interest which dictates restricted procedures.

This disability prompts States Marine to rely upon factually useless authorities. In *Estes* v. *Texas*,[94] the issue was "whether the petitioner, who stands convicted . . . was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial." *Gideon* v. *Wainwright*[95] held *"in our adversary system of criminal justice,* any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . ." (Emphasis supplied.)

The remainder of States Marine's criminal law authorities is no more helpful.[96] It is noteworthy, however, that even in criminal proceedings the identity of informants, which States Marine contends must be revealed to all neutral body respondents, need be revealed only when proved in the circumstances absolutely necessary to a fair

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[92] Federal Communications Commission v. Station WJR, 337 U.S. 265 (1949); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

[93] Webb v. United States, 21 F.R.D. 251 (E.D. Pa. 1957).

[94] 381 U.S. 532, 535 (1965).

[95] 372 U.S. 335, 344 (1963).

[96] Pointer v. Texas, 380 U.S. 400 (1965); In re Oliver, 333 U.S. 277 (1948).

trial, as where an informant involved in the criminal act is the defendant's only material witness.[97]

Many safeguards are properly *de rigueur* in the trial of an individual caught in the toils of a system he had no voice in making, with the enormous resources of society arrayed against him, and facing the possibility of imprisonment and the stigma attendant upon a criminal conviction. Rulings on such facts cannot be applied to investigations and deliberations of a body chosen by a small industry group to determine if unfair trade practices are occurring in violation of its agreement, where the body's procedures require the continuing approval of a federal agency charged with the power and responsibility to insure that such practices are prevented.

In *Greene* v. *McElroy*,[98] denial of security clearance prevented Greene from following his chosen profession. The denial was accomplished without affording him opportunity to examine evidence or cross-examine witnesses, nor did the body denying him clearance examine the witnesses. The Supreme Court specifically disclaimed deciding "whether those procedures under the circumstances comport with the constitution,"[99] but struck down the procedures on the ground that they had not been authorized by either the President or the Congress.

In addition to inapposite cases, States Marine's ammunition on the confrontation issue includes an allegation of "phony excuse" directed at the Commission's finding that disclosure of complainants in every case would inhibit complaints, and presentation of States Marine's theory to the contrary.[100] The testimony of the conference witnesses, documented above, thoroughly supports the finding.

The Commission considered the mandate of the notice

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[97] Roviaro v. United States, 353 U.S. 53 (1957).
[98] 360 U.S. 474 (1959).
[99] *Id.*, at p. 508.
[100] States Marine Brief, pp. 51, 52.

provision in Article 25(f)(3) to contain the required elements of fairness, then balanced States Marine's wish to have the accusers made public against the necessity of maintaining effectiveness by confidentiality, and found the latter more weighty.[101]

D. Investigation.

States Marine believes the procedure under Article 25, whereby the neutral body itself conducts the physical inspection of respondents' financial records and accounts, is violative of Section 15, thus the Commission should have required a modification providing that the respondents' own auditors may make the inspection.

The evidence allegedly supporting these conclusions is that the privacy of the member lines will be invaded without the States Marine provision; the provision has not rendered other neutral bodies ineffective; and conference witness Waldroup endorsed it.[102] The first two points are probative of nothing (and overwhelmed by other evidence), while the last is false.

The privacy of records and accounts could conceivably be breached by a Neutral Body which did not respect their confidentiality,[103] and it may be true that neutral bodies are functioning, effectively or not, under proposals similar to States Marine's, but this does not dictate disapproval of the agreement provisions. On the other hand, testimony of all the conference witnesses, *and* Mr. Boyarsky, the accountant presented as a witness by States Marine, was that the investigation must be made by the Neutral Body; the Neutral Body must be allowed physical access to records; and the respondent's auditors (who could be anyone in any country) must not be allowed to exercise control or judgment in the investigation.

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[101] Commission Report, pp. 11, 12; JA 404-406.

[102] States Marine Brief, p. 53.

[103] But, as the Commission found, there is no basis in this record for assuming such conduct. Commission Report, p. 13; JA 407, 408.

Witness Waldroup actually said he did not object to the *help* of respondent's representatives, if procuring it does not eliminate the element of surprise. He also testified those in his firm administering neutral body systems with provisions for injection of respondents' auditors considered this one superior, and that he has received no complaints of inconvenience during any investigation.

E. Hearing.

States Marine claims, despite the specific hearing provision in approved Article 25(f)(3),[104] and despite the absence of proof of unfair hearings by neutral bodies under the old system, that the conference hearing procedure is unfair. Once again, it looks to isolated remarks of the witnesses to buttress its contentions.[105] The remarks prove nothing.

Witness McCone's testimony was respondents should be treated with all fairness and should be given an opportunity to defend themselves, but not necessarily during the initial investigation.[106] Mr. Waldroup's characterization of the hearing as a "formality", etc., arises from the fact that he conducts a dialogue with the respondent during the investigation, throughout which the respondent is given a continuing opportunity to rebut. The fact that no one has complained to Arthur Young or the Commission about Neutral Body unfairness[107] is conclusive proof it has not existed.

F. Criteria for Assessments.

States Marine contends, on the evidence it presented, the Commission was bound to find the absence of enumerated

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[104] JA 446.
[105] States Marine Brief, p. 55, 56.
[106] Tr. 581, 681; JA 84, 88, 89.
[107] Except States Marine, whose claim was rejected in Docket 920.

criteria for assessments by the Neutral Body violative of Section 15, and to modify the provisions to include States Marine's seven suggested criteria.[108] These criteria were unnecessary in the opinion of the conference witnesses, since past assessments have not been excessive.

Again, States Marine's attempt to prove past unfairness falls flat. It offers the three assessments by Lowe as examples of unfairness. As pointed out above, there was nothing unreasonable about assessments under those circumstances.

The Pacific Westbound Conference example shows no oppressiveness. States Marine's witness would not put in the record the amount of cargo secured by the $93.00 undercharge,[109] nor is there any means of determining how many thousands of dollars in freight revenue may have been procured as a result of it. The assessments must be sufficiently high to make malpracticing unprofitable. As Mr. McCone pointed out, this is difficult to determine, and the fact that his line thought the assessment against it "a little bit high" did not shake its confidence in the Neutral Body.

G. Right of Appeal

There is no evidence of record that lack of an appeal from neutral body determinations violates Section 15. The testimony of conference witnesses that an appeal was unnecessary, would weaken the neutral body, and would necessitate disclosure of the complainant shows that inclusion of an appeal provision would be detrimental to the self-policing effort.

States Marine concedes no principle requires an appeal, yet it attacks the Commission's finding on this question, resorting to a frivolous attack on the Commission's rea-

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[108] States Marine Brief, pp. 56-59.

[109] Tr. 258.

soning, and accusing it of seeking "excuses" for its approval.[110]

States Marine also falls back upon its unfounded allegations of unfairness, and looks to *Silver* for an appeal requirement.[111] None of these merits further comment.

CONCLUSION

States Marine is asking this Court to formulate a rule of law requiring a private, international, industrial self-policing agreement, specifically sanctioned and encouraged by Congress and democratically adopted by the parties who must live under it, to provide explicitly for procedures modeled after those of courts administering our adversary system of criminal justice.

The approved agreement provisions had never been effectuated, prior to their approval by the order under review. Thus, despite States Marine's claim that the evidence shows the agreement should have been disapproved, it is really contending, as a matter of law, these provisions are so unfair on their face they must necessarily operate in one of four ways condemned by Section 15 of the Shipping Act.

All this is requested in disregard of the dire necessity for eliminating the ills of the industry, and in the face of a contrary, considered judgment by the expert body charged with administering the policy of our government toward the ocean shipping industry.

Intervenors ask this Court to uphold the judgment of the Maritime Commission, a judgment reached on the basis of years of experience with the attempts of these conferences and many others to foster open competition within the framework of a stable rate structure and regular service, and to eliminate unfair, secret competition. After 1700 pages of testimony, the Commission found, on the facts

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[110] States Marine Brief, pp. 60, 61.

[111] This contention is met in the argument above, on *Silver*.

and the law, the neutral body agreement is fair and in no way offends the Shipping Act. Reversal of the Commission's approval would be a death blow to the attempts of serious, responsible shipping lines to improve competitive conditions in the Japan/U.S. shipping trades.

Respectfully submitted,

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DATED: September 19, 1966.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,134

STATES MARINE LINES INC., GLOBAL BULK TRANSPORT CORPORATION, *Petitioners,*

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, *Respondents,*

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, AND THE MEMBER LINES THEREOF, *Intervenors.*

Petition to Review an Order of the Federal Maritime Commission

INTERVENORS' REPLY TO THE JUSTICE DEPARTMENT'S BRIEF

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ARGUMENT

I. Congress and the Maritime Commission have Rejected the Justice Department's Anticipatory Arguments Against the Approved Neutral Body Provisions; This Court Should Also Or Self-Policing in These Japan Trades Will Be Frustrated for Another Interminable Period.

Years of investigating the ocean freight industry convinced the Celler Committee the U. S. foreign trades were "rife with malpractices."[1] The Committee endorsed indus-

[1] Antitrust Subcommittee of the House Committee on the Judiciary, *The Ocean Freight Industry*, H.R. Rep. No. 1419, 87th Cong., 2d Sess. (1962), pp. 392, 393. In this report (pp. 268-271; 273-275), States Marine's particular rebating techniques were singled out.

trial self-policing, and specifically commended the Neutral Body System, finding it offered "a number of advantages in securing effective industry self-policing" because,

1. It provides an agency to which members can channel complaints of malpractice with the understanding that their identity will be kept confidential.
2. It can conduct or arrange for independent investigation of complaints involving conduct taking place in a number of foreign countries.
3. It has the psychological advantage of being a nongovernmental independent agency.
4. Finally, while it affords machinery for quasi-judicial proceedings, it need not be bound by formal rules of evidence and procedure.[2]

Alarmed over the revelations of widespread abuses in the conference system, Congress amended the Shipping Act, 1916, to require conference policing of obligations arising under Commission-approved agreements.[3] This mandate was adopted over the strenuous objections of the Justice Department, which had sought to convince Congress it should not permit conferences "to use penalties to coerce compliance with their cartel agreements" which assessments it described as "harsh" and discriminatory."[4] But both House and Senate Committees, after analyzing the Department's testimony, were prompted to report:

> The Department of Justice testimony on the legislation was generally unfavorable. While its position is consistent with the antitrust policy of the United States, it fails to take into account the peculiar nature of the particular business involved.[5]

Since passage of the 1961 amendments, the Maritime Commission has implemented the will of Congress by its General Order 7, which requires conference self-policing machinery, and notes the desire of Congress to leave to the conferences the formulation of procedures adapted to

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[2] *Id.*, at p. 316.
[3] 39 Stat. 733, 46 U.S.C. §814, as amended.
[4] Sen. Doc. No. 100, 87th Cong. 2d Session, p. 235.
[5] *Id.*, at pp. 123, 201.

their particular trades. Thus, the Order states: "Nothing in these rules specifies the particular method of procedure which must be used for self-policing."[6]

Though in Docket 920 (petitioners' first attack upon intervenors' initial Neutral Body System),[7] the accounting firms intervenors chose were technically disqualified from acting as Neutral Body by a narrow Commission interpretation of their approved agreement, the Commission reassured intervenors its decision "in no way" reflected upon the conduct or ethics of the firms involved, and it suggested they could "modify the conference agreement (subject to Commission approval) to permit the use of . . . [such an] international accounting firm as Neutral Body. . . . The choice of the appropriate course of action should remain with the conference and its members. . . ." Intervenors thus modified their system and the Commission has twice approved it. Despite this legislative and administrative rejection of its views, the Department once more presents its well-worn congressional position, and contends this system is "unfair" and the penalties are "harsh."[8]

Although this case has been before the Commission for three years,[9] the Department did not bother to intervene or even except to the Examiner's Initial Decision. Nevertheless, at the eleventh hour, it requests reversal of the Commission's expert determination, on the basis of speculation and anticipation the provisions, as interpreted and approved by the Commission, are unfair.

The Department requests an advance determination the approved provisions, in a vacuum, are unfair, because it imagines under them alleged violators *will be* treated unfairly. In such situations, the courts have refused to anticipate unfairness. In response to objections that an administrative tribunal, as constituted, was biased and partial, and also that no appeal had been provided, the Supreme

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[6] Federal Maritime Commission General Order No. 7 (28 Fed. Reg. 9257, August 22, 1963).

[7] States Marine Lines, Inc. v. Trans-Pacific Freight Conference of Japan, 7 F.M.C. 204 (1962).

[8] Department of Justice Brief, *passim*.

[9] The Commission initially approved the system on October 30, 1963.

Court in *Fahey* v. *Mallonee* [10] held: "We cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted."

Reversal would leave intervenors with no means of enforcing the obligations of their approved agreements in trades which have "had extended histories of instability" and which "remain potentially volatile;" [11] would continue to serve petitioners' anti-self-policing policy; [12] and would frustrate for another interminable period what Congress in 1961 declared must be done to restore ethical practices to our foreign trades.

II. Neutral Body Decisions are Reviewable by the Maritime Commission and Must be Made on Evidence Revealed to the Accused Line in Original Form or in Substance Sufficiently Detailed to Allow Rebuttal.

Fundamental factual error by the Justice Department causes its erroneous forecast of unfairness. The Justice Department understands there is no appeal from the determinations of the Neutral Body under the approved system, the Neutral Body being the "sole and final authority." [13] The reality is, if the Neutral Body should render a decision which is arbitrary or unfair, the decision will be struck down by the Maritime Commission *sua sponte*, or upon the complaint [14] of the accused line under Section 15 of the Shipping

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[10] 332 U.S. 245, 246, 247 (1947). See Also: Webb v. United States, 21 F.R.D. 251, 257 (E.D.Pa. 1957), holding, "[T]he absence or, for that matter, the presence of any such written requirements do not *ipso facto* make procedure unfair or fair. . . . To decide now . . . would be the rankest speculation."; F.C.C. v. Station WJR, 337 U.S. 265, 277 (1948), holding, fairness is "for case-to-case determination . . . any other approach would be . . . highly abstract, indeed largely in a vacuum."

[11] Federal Maritime Commission Initial Decision, Served August 5, 1965, p. 4.

[12] See: Exhibit 5, States Marine's self-confessed "extreme" (Tr. 1286) policing proposal it sought to foist upon the other twenty-five lines. The proposal calls for identity of complainants and confidential sources, notice before investigation of books and records, the use of its own directly retained auditors to make the investigation, and other destructive gimmicks.

[13] Department of Justice Brief, at pp. 3, 8.

[14] In addition to the Commission's power to investigate on its own motion, any person may file a complaint under Section 22 of the Act, 39 Stat. 736, 46 U.S.C. 821, as amended.

Act, 1916, as amended,[15] which requires the Commission to "disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers . . . or to operate to the detriment of the Commerce . . . ," or to declare "unlawful" the carrying out of any agreement before approval.

Under Section 15, the Commission may prevent any form of arbitrariness or unfairness in a Neutral Body decision by disapproving intervenors' self-policing provisions or by condemning any unapproved interpretation of them. It is precisely the latter form of review States Marine resorted to in the oft-cited Docket 920 case,[16] where the Commission found the members had misinterpreted their approved system. The Commission thus found an unapproved agreement had been effectuated and invalidated the Neutral Body's assessments. The Justice Department then recovered penalties from the members for so interpreting their agreement. It is surprising the Department would pass over this statutory remedy which would protect the lines against any form of arbitrariness.

This discussion leads to the question of what guidelines the Neutral Body must follow in holding hearings. The Justice Department understands the Neutral Body may decide on the basis of "secret" evidence which may have come from an undisclosed complainant-competitor. This is not so. Article 25 of the approved agreement states that: "at such hearing, the Neutral Body shall consider all of the available evidence and make its decision in accordance with the standards. . . ." (JA 447).

The conferences interpret this provision as requiring the Neutral Body to reveal all the actual evidence which it has or, if it must withhold a portion of such evidence in its original form to protect the identity of the complainant or confidential sources of information, it must reveal the substance of that evidence in sufficient detail to allow the respondent to rebut it. Any evidence which is not made avail-

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[15] Stat. 733, 46 U.S.C. §814, as amended.
[16] *Supra*, Note 7.

able at the hearing in one manner or the other may not be relied upon as a basis for decision.

The conference interpretation accords with that of the Examiner, who held "the substance of the evidence relied upon in reaching a finding that a breach has been committed must be disclosed to the accused in sufficient detail to give him an opportunity to show that it is untrue." [17] It also accords with the interpretation of the Commission that "the substance of the evidence relied upon in reaching a finding that a breach has been committed must be disclosed to the accused in sufficient detail to give him an opportunity to show that it is untrue otherwise the elements of fundamental fairness are missing." [18] If, in the Commission's judgment, the Neutral Body does not follow this fundamentally fair practice in any case, its decision will be set aside, because the members are bound by the interpretation the Commission has approved.

No more extensive revelation of information is required under any applicable precedent. Even the broad statement in *Greene* v. *McElroy* [19] required only that the evidence used to "prove the Government's case" be revealed to one seriously injured by governmental action. Moreover, despite its general language, the *Greene* opinion displays the Supreme Court's reluctance to lay down an inflexible rule that an arm of the government is constitutionally required to reveal all the evidence on which such an administrative decision is based, since the reversal merely was grounded upon a lack of legislative or executive authorization for the procedures.

Intervenors submit the Supreme Court would never hold vital security interests must be sacrificed in order to present one deprived of security clearance with all the *original* evidence used as the basis for decision, when the interest in security and the individual's interest in defending himself can be protected by revealing some parts of the evidence in substance sufficient to allow rebuttal. Under the Neutral

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[17] JA 351.
[18] JA 407.
[19] 360 U.S. 474 (1959).

Body System, the vital interest in effective self-policing dictates this be so, while the Commission's ever-present reviewing power will insure that it is.

III. The Justice Department's "Appeal" Proposal Would Seriously Impair the Neutral Body's Effectiveness, Is Unnecessary, and Unsound.

The foregoing facts remove the underpinnings of the Justice Department's "secret" evidence and lack of review contentions. The Department also contends the fact the Neutral Body may be authorized to audit the books of a member line leads it to believe the decisional process should be removed from the Neutral Body and rested in a panel of arbiters any time the respondent line desires.

All the Neutral Bodies have been international certified public accounting firms. These firms possess the worldwide facilities for successful malpractice investigations, the background and technical know-how requisite to understanding the complex data collected and making an accurate decision thereon, plus the integrity necessary to fair decisions (Tr. 429, 761, 791). The only available firm with Japanese offices but without a professional relationship with any member line is the present Neutral Body, Arthur Young & Co. (Tr. 443, 668, 669, 741, 948; JA 75, 87, 91, 105.) [20] States Marine refused to assist intervenors in selecting a self-policing agent, stating it had "no knowledge of a suitable Neutral Body in Japan." [21]

One of the likely results of arbitration is that the panel of arbiters will not fully appreciate the necessity for assessments which will render malpracticing unprofitable. The conference witnesses testified it is important for the Neutral Body to have discretion in the level of assessments, because it is possible to malpractice profitably if they are inadequate (Tr. 777, 779). They also stated the present

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[20] The Commission affirmed the Examiner's finding that the exclusion of such relationships would "disqualify or bring about the disinterest of most, if not all, of the otherwise eligible firms, thereby destroying this self-policing system." JA 411.

[21] Exhibit 38.

scale of maximum assessments is reasonable (Tr. 778). This becomes obvious when it is considered the revenue from one voyage can easily reach a quarter of a million dollars. Malpracticing can only be made unprofitable by assessments commensurate with the revenues at stake. On the other hand, the respondent is safer in the hands of one who has the background to distinguish between breaches which merit a large assessment and those which do not.

In addition, it may be assumed a line unscrupulous enough to cheat on its conference obligation will procure an arbiter biased in its favor, in regard to the merits, the level of assessment, and in regard to the choice of a third arbiter. The Justice Department proposal would shift the decision-making process from an impersonal, professional firm chosen by conference vote specifically for its integrity and make the choice a game of chance. There is no sacrosanctity about arbiters which would justify the Justice Department's touting them over firms chosen for their integrity. The conference would have to search for an arbiter familiar enough with shipping to appreciate the ramifications of the assessment level and hope he can agree with the respondent's arbiter on the selection of another with similar qualifications.

The prevailing climate in the conferences is such that requiring amendment to include the arbitral process will significantly lower the essential deterrent effect of the system.[22] On the other hand, the Justice Department, relying on its infused knowledge of shipping industry problems, "believes" such a modification is feasible. Its reasoning in support of this belief is unsound. The importance of its own objections is destroyed when it states[23] the so-called "secret" evidence would rarely be vital because the facts are usually found in the documents of the accused. Since such evidence will rarely be vital, the problem is largely academic, and is of insufficient importance to cause reversal of the Commission's approval. The only prop for the Justice Department's appeal proposal left standing is the fact that

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[22] Tr. 438, 515; JA 73, 77.

[23] Department of Justice Brief, at pp. 9, 10.

a Neutral Body may have a professional relationship with a member line if the relationship is disclosed and the conferences approve it.

The conferences believe they can select a Neutral Body who carries out such independent contractor services for one of their conference colleagues but will in no way be biased as a result of performing such unrelated auditing services. Furthermore, they believe, as the Commission's report indicates, the past and present Neutral Bodies were of this character. Should the member lines be unable to find a person of such integrity, and should they fear to be investigated by any available firm or person with such a relationship, they will not approve the relationship.

The need for such policing machinery in these trades is apparent. Moreover, the courts have never required the disciplinary tribunals of voluntary associations to fit the judicial mold, whether federally regulated or not. The disciplinary machinery for such associations will vary according to their size, purpose, and the particular circumstances. The standard is not due process but the even less technical standard of natural justice applicable to association proceedings conducted on a contractual basis. While the courts will protect the members of such associations from arbitrary and capricious action, they have refused to entertain technical, procedural objections.[24] These principles lend support that the delineated professional relationships here do not legally offend any Shipping Act standard.

The Justice Department's contrary opinion must necessarily have one of two bases:

(1) It knows better than the member lines themselves whether they can exercise such judgment, or

(2) The lines will attempt to exercise such judgment, but will choose a Neutral Body which is biased against one or more of their conference colleagues.

The first ground does not merit serious consideration. The fallacy of the second as a basis for overturning the Commission's approval is that, if the lines have the animus

[24] See: Brief for Intervenors, pp. 31-33.

to do this, the absence of a professional relationship would not deter them from secretly "buying" the Neutral Body, *or* the arbiters.

The Justice Department's brief furnishes no basis in fact, law, or reason for this Court's casting aside the judgment of the twenty-five conference members (save one) and the Maritime Commission that the approved agreements provide all the procedural opportunities for a respondent that are necessary for fairness, and that additional, or different, procedural opportunities carry the price of endangering the effectiveness of the Neutral Body.

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